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82-486

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether 42 U.S.C. § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* v. *Breckenridge*, 493 U.S. 88), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985(3) suit for damages?*

---

* The parties to this case are
Paul E. Scott
James T. Matthews
A. A. Cross
A. A. Cross Construction Co., Inc.
Bill Moore
Robert Wayne Fault
Bruce Hill
Curtis Beasley
Jay Desormaux
Fish Ferguson
John Wallace, Jr.
Asbestos Workers, Local 22
Asbestos Workers, Local 112
Boilermakers, Local 587
Bricklayers, Local 13
Carpenters, Local 610
Carpenters, Local 753
Carpenters, Local 2007
Cement Masons, Local 884
Cement Masons, Local 804
Lathers, Local 416
Pipefitters, Local 2484
Engineers, Local 450
Painters, Local 328

Pipefitters, Local 1347
Pipefitters, Local 195
Plumbers, Local 504
Electrical Workers, Local 479
Ironworkers, Local 125
Laborers, Local 852
Roofers, Local 116
Sheet Metal Workers, Local 196
Teamsters, Local 920
Laborers, Local 870
Sabine Area Building Trades Council

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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Brotherhood of Carpenters and Joiners of America, Local 610 (AFL-CIO), United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local 195 (AFL-CIO), and the United Brotherhood of Carpenters and Joiners of America, Local 753 (AFL-CIO) respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Scott* v. *Moore*, C.A. 5 No. 79-1196 (July 1, 1982).

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 680 F.2d 979 and is reproduced at pp. A-1 to A-55

of the separately bound appendix to this petition ("App."). The panel opinion of the Court of Appeals is reported at 640 F.2d 708 and is reproduced at App. B-1 to B-29. The opinion of the District Court is reported at 461 F.Supp. 224 and is reproduced at App. C-1 to C-11.

JURISDICTION

The *en banc* decision and the judgment of the Court of Appeals were issued on July 1, 1982. App. A-1 to A-55 and E-1 to E-2. The jurisdiction of the District Court was invoked under 42 U.S.C. § 1985(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves, Rev. Stat. § 1980, 42 U.S.C. § 1985 (3), which provides in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disguise on th ehighway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a claim of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more the conspirators.[1]

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[1] 42 U.S.C. § 1985(3) is "the surviving version of § 2 of the Civil Rights Act of 1871." *Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 368. That provision is occasionally referred to as "§ 1985(c)." See, e.g., 442 U.S. at 368.

STATEMENT OF THE CASE

A. Factual Background.

For the purpose of this petition, we accept the following description of the parties and the background facts in the majority opinion below: [2]

> This case arises out of an episode of mob violence [at the Cross Construction Co.'s Alligator Bayou Pumping Station construction project near Port Arthur, Texas (during which company employees were injured and company equipment and other property was damaged)] that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions.
>
> • • • •
>
> A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur.
>
> • • • •
>
> In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union

[2] The omitted portion of that court's description pertains in large part to the identity of those responsible for the January 17, 1975 incident, an issue not addressed by the petition.

affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

* * * *

* * * The entire [January 17] episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their [resulting] injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers. [App. A-4 to A-6.]

B. Proceedings in the District Court.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. The plaintiffs sought and obtained a temporary injunction against violent, intimidating, or destructive acts against employees at the Alligator Bayou Pumping Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as a plaintiff and the Sabine Area Building and Construction Trades Council and twenty-five local unions as defendants.

After trial, the district court found that the plaintiffs had proved that the defendants conspired to deprive them of the equal protection of the laws in violation of 42 U.S.C. § 1985(3). That court made the preliminary injunction permanent against all the defendants except one

of the local unions. The district court also assessed damages against eleven of the local unions: the individual plaintiffs were each awarded $5,000.00; palintiff Cross Construction Company was awarded $112,385.14. App. D-1 to D-5.

C. Proceedings in the Court of Appeals.

The defendants appealed. All the unions objected to the injunction as inconsistent with the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101 *et seq.* The defendants against whom damages had been awarded appealed on the grounds that the plaintiffs had not established a cause of action under 42 U.S.C. § 1985(3), and that the responsibility of the individual organizations had not properly been established under § 6 of the Norris-LaGuardia Act's "clear proof" standard of agency (which they urged governs) or even under the common law's standard of agency.

A panel of the Court of Appeals: sustained the injunction (App. B-7 to B-9); held that a claim under 42 U.S.C. § 1985(3) was stated (App. B-9 to B-20); and held also that § 6 of the Norris-LaGuardia Act is inapplicable (App. B-23 to B-25). However, that court determined that under common law principles of agency the evidence adduced at trial was sufficient to establish the liability of only three of the unions (the present petitioners) and reversed the damages judgment against all the other union defendants (App. B-25 to B-28).

The Court of Appeals then agreed to rehear the case *en banc*, and on rehearing reaffirmed by a 14-10 vote the panel's judgment in all respects. In an opinion by Judge Charles Clark (the author of the panel opinion), that court concluded as follows:

> In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C.

> § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113 (c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions. [App. A-29 to A-30.]

The principal dissent by Judges Rubin and Williams for eight members of that court concluded: that the injunction is not authorized by the Norris-LaGuardia Act (Point I, App. A-31 to A-36); that § 1985(3) does not grant a cause of action for the defendants' conduct (Point II, App. A-36 to A-49); and that none of the union defendants could be held liable for damages both because § 6 of the Norris-LaGuardia Act does apply, and because there was insufficient evidence that any of the defendants were responsible under common law agency principles (Point III, App. A-49 to A-50). Judge Anderson filed a separate dissenting opinion agreeing with the principal dissent on Points I and III, and not reaching the § 1985(3) issue. App. A-50. Judge Garwood also filed a separate dissenting opinion concluding that the plaintiffs did not state a cause of action under 42 U.S.C. § 1985(3). App. A-50 to A-55.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ON IMPORTANT QUESTIONS OF FEDERAL LAW IS IN CLEAR CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Introduction

In *Griffin* v. *Breckenridge*, 403 U.S. 88 ("*Griffin*"), this Court determined that a complaint based on 42 U.S.C. § 1985(3) against a private conspiracy states a cause of action if the complaint:

> allege[s] that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States." [403 U.S. at 102-103.]

In this respect, *Griffin* overruled *Collins* v. *Hardyman*, 341 U.S. 651, which had held that only conspiracies under color of state law are actionable under § 1985(3). But the *Griffin* Court emphasized that the conclusion that "the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious conspiratorial interferences with the rights of others" (403 U.S. at 101). And the *Griffin* opinion takes pains to avoid the path of "interpreting § 1985(3) as a general federal tort law" by

> requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and

> Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [403 U.S. at 102, footnotes omitted, emphasis in original.]

There is, we believe, no need to belabor the consequences for the federal courts' ability to discharge their other responsibilities of reading § 1985(3) as a "general federal tort law." And the decision below is a particularly notable instance of a court of appeals taking an expansive view of § 1985(3) in order to transmute a claim for misconduct that would be actionable in state court under the common law of torts[3] into a cause of action triable in federal court. In so doing, the majority of the court below resolved in plaintiffs' favor three distinct issues, each of which is of fundamental and recurring importance in § 1985(3) litigation, and as to each of which there are, as we shall now show, squarely conflicting decisions in other circuits:

1) Whether § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* itself), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985(3) suit for damages?

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[3] See, e.g., *United Workers v. Laburnum Corp.*, 347 U.S. 656; *Automobile Workers v. Russell*, 356 U.S. 634.

A. The Conflicting Decisions on Whether a § 1985(3) Claim Based On Private Interference With Associational Rights States a Cause of Action.

The majority below determined that the defendants' private conspiracy violated an associational right of the plaintiffs protected by the Fourteenth Amendment[4] and is therefore actionable under § 1985(3) despite the absence of any evidence that it was an object of the conspiracy to cause any governmental interference whatsoever with that right. App. A-9 to A-12. The holding that § 1985(3) is applicable although the objective of the conspiracy does not encompass governmental interference with the plaintiff's associational freedom is squarely contrary to Judge (now Justice) Stevens' reading of § 1983 (3) in *Dombrowski v. Dowling*, 459 F.2d 190 (C.A. 7) ("*Dowling*"): Where a § 1985(3) plaintiff claims interference with a right that has its source in the Fourteenth Amendment there must be state involvement of some kind because the Fourteenth Amendment (unlike

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[4] In their principal dissent Judges Rubin and Williams say:

> Our colleagues interpret § 1985(3) to find that it protects a *constitutional* right of association, or more specifically, the *constitutional* right, first found to exist in this very opinion, of nonunion workers to work with other nonunion workers. This right is analogized to the right of political association. Protection for political association is thus expanded into protection for any kind of association having some economic community of interest. This seems to us to confuse the *right* protected with the *class of persons* protected. Although there is a constitutional right to refuse to work, no court, so far as we know, has ever previously found thatworkers have a constitutional right to work only with the kind of persons they choose to work with. [App. A-42, emphasis in original.]

We believe that the foregoing objection to the majority's reasoning is sound and reserve our position thereon for the Court's consideration if review is granted. Further discussion of this point now is particularly unnecessary because, as the principal dissent notes, this aspect of the majority below's reasoning "confuse[s] the *right* protected with the *class of persons* protected", and the "class" issue, which independently merits review, is discussed in Point B, *infra*.

the Thirteenth Amendment and the constitutional right to travel) protects only against state action. In *Great American Fed. S. & L. Assn v. Novotny*, 442 U.S. 366 (*"Novotny"*), while the Court did not reach the issue, Justice Stevens' concurring opinion reiterates the *Dowling* analysis and conclusion. 442 U.S. 384-385. And in his concurring opinion therein, Justice Powell approved *Dowling's* analysis and conclusion. 442 U.S. at 378-381. See also the principal dissent at App. A-36 to A-42 and Judge Garwood's dissent at App. A-50 to A-53.

The majority below expressly acknowledged a conflict between its decision and that in *Dowling* and discussed at some length its grounds for sustaining plaintiffs' claim although *Dowling's* reasoning would require rejection of that claim. Indeed, the court below acknowledged: that the "Seventh Circuit subsequently extended the *Dowling* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedom" (App. A-12);[5] and that the view of the Fourth Circuit is in accord with that of the Seventh (App. A-12 citing *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (C.A. 4)). More recently, the First Circuit has aligned itself with the Fourth and Seventh Circuits. *Rice v. New England College*, 676 F.2d 9, 11 (C.A. 1). However, *Action v. Gannon*, 450 F.2d 1117 (C.A. 8 *en banc*) is in accord with the decision below on this issue.

In sum, the Fifth and Eighth Circuits' conclusion that a claim of a private conspiracy to interfere with associational rights states a § 1985(3) cause of action is in direct conflict with the conclusion of the First, Fourth and Seventh Circuits that such a claim does not state a § 1985(3) cause of action. And, we submit, *Dowling's*

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[5] One of the plaintiffs in *Murphy*, appellant Senese, asserted the identical right claimed by the employee-plaintiffs here—to work with other nonunion employees (see 543 F.2d at 1191, 1192).

close-textured analysis of the statute's language, structure and history and of the *Griffin* opinion, is not only the majority view but is also entirely sound.[6]

B. The Conflicting Decisions On The Type Of Class-Based Animus That Is Cognizable Under § 1985(3).

(i) In *Griffin*, the Court expressly reserved the question whether "a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3)" relating to "equal protection, or equal privileges and immunities" (403 U.S. at 102, n.9). The courts of appeals have generally answered that question in the affirmative, but there agreement ends. The decisions collected in the majority opinion (App. A-15) and in the principal dissent (App. A-45), reveal a series of seemingly *ad hoc* determinations which invite federal litigation. As one commentator has observed:

> While the class-based animus requirement is superior to other limitations designed to prevent the creation of a general federal tort remedy because it gives full effect to the original congressional purpose, it has also been the most elusive and inconsistently applied of the section 1985(c) elements. [*The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 Minn. L. Rev. 635, 641 (1980).]

(ii) In addition to the general confusion among the courts of appeals in identifying protected and unprotected classes for the purposes of § 1985(3), there is a more particularized conflict between the decision below and those of other courts of appeals. The Fifth Circuit's judgment herein depends on the proposition that nonunion individuals who are prevented from working by violence are protected by § 1985(3). The Sixth Circuit has squarely held to the contrary in *Browder* v. *Tipton*, 630

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[6] For the Court's convenience the relevant portion of *Dowling* is reproduced as an appendix to this petition.

F.2d 1149 (C.A. 6).[7] *Browder*, as the Sixth Circuit noted, had been anticipated by its earlier decisions excluding from § 1985(3) protection "classes formed by corporation employees fired for filing OSHA complaints, *Taylor* v. *Brighton Corp.*, 616 F.2d 256 [and] a non-Union employer, *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673 (6th Cir. 1976)" (630 F.2d at 1152).

Moreover, the Tenth Circuit has held that an allegation of a conspiracy against the plaintiff to deprive her "and other employees 'who were engaged in organizing a labor union' of the equal protection and enjoyment of the laws of the United States" does not state a § 1985(3) claim. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743, 746 (C.A. 10). That court explained:

> To state a cause of action under section 1985(3) the law requires prejudice against a class *quo* class. Here it seems clear from the complaint as a whole that the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved. See *Lessman* v. *McCormick*, 591 F.2d 605, 608 (10th Cir. 1979). We hold this is essentially a private feud not within the intended scope of the Act's coverage. As was aptly stated by the district court, to hold otherwise would make § 1985(3)

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[7] In *Browder*, Judge Merritt wrote:

> By failing to show the unique fashion in which they exercise a fundamental right, plaintiffs fail to allege that they are members of a protected class. Defendants here, given their motive, would have thwarted due process for all those—and only those—who crossed the picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154].

> "applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation." 460 F. Supp. at 407. [637 F.2d at 748]

On the facts found below, in this case, as in *Silkwood*, "the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved." *Id.* at 748. As the principal dissent herein pointedly observed:

> It is difficult for us to divine exactly what class is intended by [the majority's] differing [definitional] phrases, for the evidence makes it clear that [plaintiffs] Scott and Matthews were not attacked because they were not union members or because they wished to work with "other" nonunion members, but because they chose to work for Cross Construction, a firm that hired nonunion workers and did not pay union wages. [App. A-43, footnote omitted, referring to the majority opinion below at A-18]

Thus, on this issue, as on the private interference with associational rights issue, there is a clear court of appeals conflict and the Fifth Circuit's expansive reading of § 1985(3) is the minority view.

(iii) The determination that the individual plaintiffs are members of a class protected by § 1985(3) conflicts not only with decisions of other courts of appeals but, in one vital respect also with this Court's analysis of the statute in *Novotny*. The majority below said:

> Similarly, acknowledging that the scope of the statute includes nonunion workers who are attacked for their choice to associate with other non-union workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. [App. A-18.]

The "federal legislation" thus referred to is the National Labor Relations Act as amended by the Taft-Hartley

Act. Specifically, the majority below relied on the amendment to § 7 that protects "the right to refrain from", *inter alia*, forming, joining or assisting labor organizations, and on the adoption of § 8(b)(1) which declares it to be an unfair labor practice to restrain and coerce employees in the exercise of § 7 rights. App. A-18 to A-19. The majority's reliance on the NLRA is contrary to the reasoning of *Novotny*. The Court there held that § 1985(3) may not be invoked to redress violations of Title VII of the Civil Rights Act of 1964 because Title VII establishes a comprehensive plan of administrative and judicial process for vindicating the rights declared therein. See 442 U.S. at 372-378. The same is, of course, true of the NLRA, § 10 of which provides that the National Labor Relations Board shall remedy violations of the Act, including interference with the rights stated in § 7. The majority below thus relies on a factor expressly disapproved in *Novotny*—other federal legislation declaring the same conduct to be illegal.

C. The Conflicting Decisions On the Persons Entitled to Sue Under § 1985(3).

The majority below recognized that the plaintiff-employer, Cross Construction Company, is not a member of the class of nonunion employees which the majority below determined to be protected. App. A-9. Nevertheless, the holding below is that this plaintiff is entitled to sue under § 1985(3) for its injuries. App. A-19 to A-20. The principal dissent expressly disagreed. App. A-46 to A-47. As both the majority below and the dissent recognized, the Ninth Circuit has reached the conclusion opposite to that reached in this case. See *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (C.A. 9), *cert. den.*, 454 U.S. 967:

> The law of this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3). *Briley v. California*, 564 F.2d 849, 859 (9th Cir. 1977); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 (9th Cir. 1975). [641 F.2d at 721.]

D. The Importance of the Questions Presented.

The majority below recognized at the outset of its opinion: "This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between Section 1985(3) and the labor relations laws." App. A-4.[8] Indeed it is fair to say that the three questions presented here comprise the entire corpus of the basic questions concerning the meaning of § 1985(3) that are open after *Griffin* and *Novotny*. Given the conflict and confusion in the courts of appeals on these important and difficult questions concerning a critical provision defining the scope and nature of the federal court's jurisdiction, and given that the holdings below on the first and last of these questions are expressly stated in the broadest terms we note only one additional point.

At the conclusion of its discussion of the scope of the protected class (App. A-20) the majority below endeavors, in the dissenting judges' apt metaphor, to reconfine the genie in the bottle. The result, however, is to create further uncertainty. The principal dissent's critique merits quotation in full:

> Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in

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[8] This petition does not call into question the holding below that the Commerce Clause empowers Congress to provide a remedy to prohibit the activities in this case. (Of course, as noted earlier, Congress has done just that in § 8(b)(1) of the Taft-Hartley Act.) We do believe, however, that the felt necessity of the majority below to rely on the Commerce Clause, rather than the Fourteenth Amendment, as the constitutional source of congressional power (App. A-21 to A-23) reflects adversely on its statutory interpretation. Section 1985(3) was unquestionably part of legislation to enforce the Fourteenth Amendment and the fortuity that this particular incident affected interstate commerce should therefore be irrelevant in determining whether the incident is covered by the statute. See the principal dissent at App. A-47 to A-48; Garwood, J., dissenting at App. A-54 to A-55.

dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another." We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. (If the decision is based on principle, and not like Justice Roberts' railway ticket, "good for this day and train only," it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm. [App. A-48 to A-49; footnotes omitted.]

CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The Discussion of Whether 42 U.S.C. § 1985(3) Applies to Private Interference With Associational Rights in *Dombrowski* v. *Dowling*, 459 F.2d 190, 193-196 (C.A. 7):

Plaintiff does not contend that the defendants acted under color of state law, or that there was any state involvement in the discrimination. Since it is clear that this section covers purely private conspiracies, *Griffin* v. *Breckenridge* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, it is often assumed that state action is never an element of a § 1985(3) violation. The validity of this assumption is open to some question.

* * * *

These questions are illuminated by identifying a distinction between the interests of the plaintiff tht the statute was enacted to protect and the conduct of the defendants which it proscribes, and by considering the relationship between §§ 1983 and 1985(3), the respective lineal descendants of §§ 1 and 2 of the Ku Klux Plan Act of 1871.

Although the point is sometimes obscured or overlooked, 1983 contains two quite distinct "state involvement" requirements. The first is clearly stated in the statute: the defendants must have acted "under color of" state law. The second inheres in the nature of plaintiff's protected rights: he may not be deprived "of any rights, privileges, or immunities secured by the Constitution and laws." His Fourteenth Amendment right to protection against discrimination extends only to cases in which state action is involved.

Section 1985(3) does not expressly identify any "state involvement" requirement. The most obvious difference in language between §§ 1983 and 1985(3) is the omission from the latter of the "under color of state law" language included in the former. *Griffin* v. *Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, has squarely held that

this omission is significant and that the latter statute applies to purely private conspiracies, whereas the former applies only to conduct under color of state law. The omitted language, however, is directed to the proscribed conduct of the defendants rather than the nature of the plaintiffs' rights which are protected by the statute. Thus, although Griffin makes it perfectly clear that some purely private conspiracies among defendants are proscribed by § 1985(3), Griffin did not purport to delineate the scope of the rights secured by the statute.

With respect to plaintiff's protected interests, the language of §§ 1983 and 1985(3) also differs, but the coverage of the two provisions is probably co-extensive. Thus, the state involvement aspects of § 1983 cases which are directed to the "protected interests" rather than the "proscribed conduct" portion of § 1983 are relevant in understanding the coverage of § 1985(3). The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

Since plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of *Griffin* does not control this case. Indeed, the Court expressly noted that it was not deciding "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under § 1985(3). Thus, the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment.

The Court has, however, considered the application of a comparable statute, 18 U.S.C. § 241, in this area. In *United States* v. *Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239, the Court sustained an indictment of private citizens who had allegedly conspired to deny Negro citizens their right to equal utilization of public facilities operated by the State of Georgia. It is a fair distillation of the four opinions filed in that case to state that, although there was disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognized the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a state.

Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights. We therefore conclude that an arbitrary business discrimination against lawyers engaged in the practice of criminal law does not deprive plaintiff of "equal protection of the laws" within the meaning of § 1985(3) if there is no state involvement whatsoever in the discrimination. [Footnotes omitted.]